Filed 11/19/08 In re T.A. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re T.A., Jr., et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.A., Defendant and Appellant.	B206262 (Los Angeles County Super. Ct. No. CK61443)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Referee. Reversed and remanded.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Aleen L. Langton, Deputy County Counsel, for Plaintiff and Respondent.

T.A. (father) appeals an order terminating his parental rights with respect to P.A. and T.A., Jr. We reject father's claim the children were not shown to be adoptable but conditionally reverse the order terminating parental rights for the sole purpose of further inquiry under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and new notices, if needed.

FACTS AND PROCEDURAL BACKGROUND

P.A. and T.A., Jr., were detained on November 9, 2005, following an incident of domestic violence between father and his female companion in the presence of the children. On November 14, 2005, the Department of Children and Family Services (DCFS) filed a dependency petition alleging that then nine-year-old P.A. and five-year-old T.A., Jr., came within the jurisdiction of the juvenile court based on the incident of domestic violence, a prior incident of domestic violence between father and the children's mother, and mother's history of substance abuse. After a brief time in foster care, the children were placed with parental aunt, T.S.

The detention report included father's assertion the children have Comanche ancestry on both sides of the paternal grandparents' family. At the detention hearing, the juvenile court ordered DCFS to investigate the possibility the children were of Native American background.

A social report filed January 26, 2006, indicated P.A. was in the fourth grade and T.A., Jr., attended kindergarten and receives special education services. T.A., Jr., participated in speech therapy at school through special education and the school was in the process of scheduling an Individualized Education Program (IEP) for T.A., Jr.

On February 9, 2006, the juvenile court sustained the dependency petition and ordered mother and father to participate in the case plan.

A social report filed July 13, 2006, indicated the children's social worker (CSW) assigned to this case and T.S. attended an IEP review for T.A., Jr., at his school. T.A., Jr., is eligible to receive services for developmental delay. He attends special education speech classes and the school district recommended T.A., Jr., remain in the special day program at his present school of residence with language and speech provided in special

education classes. The IEP team also recommended that T.A., Jr., participate in the extended school year because he shows difficulty retaining knowledge after vacations and school breaks.

On July 13, 2006, the juvenile court directed DCFS to investigate placement of the children with maternal cousin, S.S. A social report prepared for August 2, 2006, indicated T.S. did not feel capable of keeping the children on a long-term basis. S.S. stated she and her husband recently had the children for a weekend visit which went well. They were very interested in caring for the children. However, S.S. and her husband, J.S., recently had married and were living in a one-bedroom condominium. The S.'s preferred to wait until their lease ended in February of 2007 or until the end of the children's school year in June, 2007 to have the children placed with them. The children indicated the visit with the S.'s was "fun" and they would like to spend more time with them. The CSW indicated the care of the children would be a big undertaking for the S.'s as they are newly married and had no children of their own. The CSW hoped the children would continue to have visits with the S.'s in anticipation of future placement in their home.

A social report prepared for November 14, 2006, indicated T.A., Jr., continued to attend special education speech classes and that he has had some behavioral problems. The report indicated T.A., Jr., does not receive psychological therapy and there has been no recommendation by the school or otherwise that he is in need of counseling. T.A., Jr., participated in the extended school year program during the summer. An attached report indicated the children had been visiting with the S.'s.

On December 15, 2006, the juvenile court terminated family reunification services and set a permanency planning hearing for April 13, 2007. An adoption process progress report prepared for that date indicated the S.'s were "motivated to have the children placed with them so they can 'see how things work out' and if the 'adoption will be an appropriate plan.' " The S.'s had recently purchased their first home. However, they were hesitant to commit to adoption as they had not yet considered having children.

A social report prepared for April 13, 2007, indicated the children had spent several weekends with the S.'s. The visits went well and the children have indicated they would like to live with the S.'s. The S.'s would like to have the children in their home for six months if possible to assure that adoption is the best plan for them. Each child told a dependency investigator they were treated well by the S.'s and neither expressed dissatisfaction or fear at the prospect of living with them. S.S. indicated she first met the children in 2003 when they were living with their mother and father. S.S. recalled that T.A., Jr., was a "handful." S.S. lost contact with the children for about two years. Approximately one year ago, mother contacted S.S. and inquired whether S.S. and her husband would be willing to care for the children. The CSW noted the S.'s are employed on a full-time basis.

The children were placed with the S.'s on June 30, 2007. A social report prepared for July 12, 2007, indicated S.S. stated the children were "wild and crazy" but doing very well. Because the children had so recently been placed in their home, the S.'s did not wish to commit to a permanent placement at this time but they were "leaning toward adoption."

The juvenile court continued the permanency planning hearing to October 12, 2007. A social report prepared for that date indicated the S.'s were "excited to move forward with the adoptive home study." The report noted the change in placement had been an adjustment for the children as well as the S.'s. T.A., Jr., has had difficulty with his behavior and he was having out-of-control temper tantrums which S.S. reported would last for hours. The social worker referred the S.'s to an agency in their area that has support groups for relative care givers. The S.'s were participating in a resource that assists children and families. S.S. reported it is like a mentoring program. The report indicated the S.'s were coping satisfactorily and the children appear to be well cared for and adjusting well to their new home. S.S. currently was not employed and is able to be home with the children after school. The report indicated T.A., Jr., was attending the second grade after completing first grade with good grades in special education. S.S. stated she is going to pursue finding a counselor for T.A., Jr., if he continues to have

difficulty. The CSW suggested his behavioral problems could be the result of prenatal exposure to drugs. The CSW reported the children have made progress in their adoptive home, the S.'s were meeting the needs of the children and the placement continues to be appropriate.

An interim review report prepared for the October 12, 2007 hearing indicated the S.'s wanted a few more months before they proceed with adoption. Based thereon, the juvenile court continued the permanency planning hearing to January 11, 2008.

An adoption progress report prepared for that date indicated the S.'s home study had been approved. A social report indicated T.A., Jr., was in the second grade. He was performing at grade level with math being his favorite subject. His academic performance ranged from "improved" to "satisfactory" and his most improved area was reading. T.A., Jr., met with a resource teacher twice a week to work on reading and met with a speech therapist once a month. T.A., Jr., was going to be seen by a dental specialist to determine whether his speech problems might be related to the structure of his mouth. T.A., Jr., had been seen for a medical examination on August 31, 2007, at which time a language delay was noted. The physician requested a speech evaluation and an IEP. The report also noted that in December of 2007 T.A., Jr., began seeing a psychologist once a week. According to the S.'s, T.A., Jr.,'s, current goal was to work on being less impulsive and aggressive. T.A., Jr., exhibits attention deficit hyperactivity disorder (ADHD) and it is believed that he may have post-traumatic stress. The psychologist had not yet reported on T.A. Jr.'s, progress as they remain in the "building rapport" stage. P.A. was doing well in school. She participated in cheerleading and drama and is the president of her class. The report indicated the children have been well cared for by the S.'s and the children enjoy living with the family. The children reported they wanted to be adopted by the S.'s. The CSW had observed the children relate to the S.'s as their parents and the S.'s relate to the children "with the same love and concern as loving biological parents would."

The report indicated the S.'s live in a well maintained townhome in a safe neighborhood. The S.'s "appear to have a stable and strong marriage with financial security. Their expectations are realistic and they interact and communicate well with children." The children have been accepted by the S.'s "immediate and extended families as part of the family." S.S. stated it was a blessing to be able to care for the children.

On February 7, 2008, the juvenile court terminated parental rights.

CONTENTIONS

Father contends the order terminating parental rights must be reversed because DCFS failed to comply with the inquiry and notice requirements of the ICWA and the evidence failed to demonstrate the children were likely to be adopted within a reasonable time.

DISCUSSION

1. *The order terminating parental rights must be conditionally reversed for further ICWA inquiry and notice, if necessary.*

a. *Relevant statutory provisions and case law.*

The ICWA provides that when a child subject to dependency proceedings is or may be of Native American heritage (referred to in the ICWA as an "Indian child"), each of the tribes in which the child may be eligible for membership must be notified of the proceedings and the tribe's right to intervene. (25 U.S.C. § 1912, subd. (a).)

Welfare and Institutions Code section 224.3, subdivision (a), imposes upon the juvenile court and the county welfare department "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child in all dependency proceedings . . . ." (Welf. & Inst. Code, § 224.3, subd. (a).)[1] Section 224.3, subdivision (c) states that if a social worker has reason to know that an Indian child is involved in dependency proceedings, the social worker is "required to make further inquiry regarding

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[1] Subsequent unspecified statutory references are to the Welfare and Institutions Code.

the possible Indian status of the child . . . by interviewing the parents, . . . and extended family members . . . and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility." (§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4).)

ICWA notice must include, if known, the name, birth date, and birthplace of the Indian child, the name of the Indian tribe in which the child is enrolled or may be eligible for membership, "[a]ll names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information." (25 C.F.R. 23.11(d)(1)(3); see *In re Louis S.* (2004) 117 Cal.App.4th 622, 630.)

The ICWA notice provisions are strictly construed. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174.)

b. *ICWA inquiry and notice in this case.*

Here, the juvenile court found the ICWA did not apply based on notices dated October 26, 2006. These notices were given after father completed an ICWA questionnaire in which he claimed Native American heritage through his father, whose name is S.D.A. and his grandfather, H.A. Father indicated his father's brother, H.A. Jr., who father believed resided in Laguna Niguel, might have further information. Father also indicated the address and telephone number for his maternal grandmother, L.J. Father further indicated that his sister, T.S., has information on their grandmother L.J. At the bottom of the page, father wrote the name "[(J.)][A.A.] Jr." and a telephone number.

The notices dated October 23, 2006, included mother and father's addresses and dates of birth, father's place of birth and indicated father's belief that he has Comanche and Cherokee heritage. The notice also stated: "Father informed this CSW that his Paternal Father was [S.D.A.] and his Paternal Grandfather was [H.A.], and they are the ones who have Indian heritage. He has cousins on the reservation in Phoenix, Arizona, but he doesn't know their names or the name of the reservation. His sister, [T.S.], said the [paternal] grandfather is [A.A.], not [H.] The CSW contacted [L.J.], maternal grandmother to [T.A.], father, and she says there is no Native American heritage on his maternal side. [T.A.]'s uncle (his grandfather's son) [A.J.A.], Jr., informed this CSW that [H.A.A.], father to him and [S.A.,] had Comanche and Cherokee heritage. He will attempt to obtain more information. He said [H.A.] Jr. now lives in Las Vegas."

DCFS submitted proof of certified mailing of the notice to the Eastern Band of Cherokee Indians, Comanche Nations, United Keetoowah Band of Cherokee Indians, the Secretary of the Interior and the Bureau of Indian affairs.

DCFS also submitted a letter from the United Keetoowah Band of Cherokee Indians dated November 1, 2006, which indicated the children were not eligible for enrollment. Letters from the Eastern Band of Cherokee Indians dated November 9, 2006, indicated the children were not Indian children. A letter from the Cherokee Nation dated November 28, 2006, referred to the names of the individuals the CSW had included in the notice and indicated the children were not considered Indian children.

On December 15, 2006, the juvenile court found proper notice had been given and the case was not an ICWA matter.

c. *Father's contentions.*

Father contends the notices mailed by DCFS were not completed properly in that the notices provided additional information regarding paternal grandfather and great-grandfather on page two of the form instead of on page four in the spaces designated for that information. On page three of the form, only paternal grandfather's name is provided and there is no confirmation the social worker spoke with T.S. regarding the dates and place of paternal grandfather's birth and death. Additionally, on page four of the form in the space provided for information regarding paternal grandfather, the form reflects "unknown" even though DCFS had obtained the name of H.A. and J.A.A. Instead, these names were provided in the additional information section of page two.

Father further notes the notices reflect that the CSW would attempt to obtain more information on the children's heritage from J.A.A. but nothing in the record indicates the social worker followed up to determine whether additional information existed. Also, there is no indication in the record that DCFS attempted to contact H.A., Jr., in Laguna Niguel or Las Vegas.

Father concludes the juvenile court's finding the ICWA did not apply must be set aside.

d. *DCFS's concession of inadequate inquiry*.

DCFS concedes the record is silent regarding the extent of DCFS's inquiry of extended family members with respect to the possible Native American heritage of the children. Because DCFS could have documented further information regarding the family heritage, DCFS does not oppose a limited reversal for the sole purpose of inquiring of paternal relatives regarding the children's heritage and thereafter providing the relevant tribes, the Bureau of Indian Affairs and the Secretary of the Interior proper notice.

We accept DCFS's concession on this point and conditionally reverse the order terminating parental rights. However, we reject father's further assertion the claimed deficiencies in the notices amount to reversible violations of the ICWA. The notices conveyed all the information then known to DCFS and this information was sufficient to provide actual notice of the dependency proceedings, enable the relevant entities to determine the Indian status of the children and the opportunity to intervene.

Thus, if further inquiry fails to develop additional information relative to the Native American ancestry of the children, the juvenile court may reinstate the order terminating parental rights without further ICWA notices.

2. *The record supports the juvenile court's finding the children are generally adoptable*.

Father contends DCFS provided no information to the juvenile court that indicated the children generally were adoptable or whether there were other prospective adoptive homes. Instead, the finding of adoptability was based solely on willingness of the S.'s to adopt the children. Thus, according to father, the adoption assessment was required to, but did not, indicate whether there were any legal impediments to adoption. (*In re Valerie W*. (2008) 162 Cal.App.4th 1, 15.)

Father also notes the juvenile court received numerous reports that indicated T.A., Jr., had special needs and behavioral problems. Further, the report filed on January 11, 2008, indicated T.A., Jr., commenced seeing a psychologist in December of 2007, and he was working on becoming less impulsive and aggressive and reducing his ADHD. It was also believed the child suffered from post-traumatic stress. However, the psychologist was in the "building rapport" stage and there currently was no report from the psychologist to indicate T.A., Jr.'s, progress in therapy.

Father argues the lack of evidence concerning T.A., Jr.'s, condition, prognosis and treatment needs, if any, undermines the basis for the determination that a prospective adoptive parent is capable of meeting that child's needs. (*In re Valerie W., supra,* 162 Cal.App.4th at p. 15.) Father asserts the deficiencies in the assessment report were significant and DCFS failed to provide the juvenile court with sufficient specific information concerning T.A., Jr., to permit the juvenile court to conclude the prospective adoptive parents were capable of meeting the child's needs. Father concludes the order terminating parental rights must be reversed.

Father's arguments are not persuasive.

In order for a juvenile court to select adoption as the permanent plan, it must find, by clear and convincing evidence, the child will likely be adopted if parental rights are terminated. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; § 366.26, subd. (c)(1).)

"A child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationship are all attributes indicating adoptability. [Citation.]" (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.) "[T]he fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. [Citation.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650, italics omitted.)

We review an order terminating parental rights for substantial evidence. (*In re Gregory A., supra,* 126 Cal.App.4th at pp. 1561-1562; *In re Erik P.* (2002) 104 Cal.App.4th 395, 400; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

Here, substantial evidence supports the juvenile court's determination the children are generally adoptable. Both children were in good physical and emotional health and were shown to be capable of forming positive interpersonal relationships. Indeed, P.A. was the president of her class. Although T.A., Jr., attended special education speech

classes and had commenced seeing a psychologist, nothing in these circumstances is so unusual as to suggest T.A., Jr., is not generally adoptable. The fact the S.'s love him, want to adopt him and are committed to providing him with a happy and stable home confirms that he is generally adoptable and is likely to be adopted within a reasonable time either by the S.'s or by another family. (*In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.)

With respect to father's assertion DCFS failed to demonstrate the absence of any legal impediments to adoption, such a showing is required only where the social worker opines the children are likely to be adopted based *solely* on the existence of a prospective adoptive parent who is willing to adopt the minor. (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650; *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1408-1409.) In this case, the children were not deemed adoptable solely based on the existence of a prospective adoptive family. Therefore, it is unnecessary to inquire into the existence of any legal impediment to adoption.

However, the absence of any legal impediment is apparent from the record. A "legal impediment" to adoption exists only if a prospective adoptive parent does not meet the requirements of Family Code sections 8601, 8602, and 8603. (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650.) These sections require that: (1) a prospective adoptive parent must be at least 10 years older than the child (Fam. Code, § 8601, subd. (a); (2) a child over the age of 12 years must consent to an adoption (Fam. Code, § 8602); and, (3) a prospective adoptive parent not lawfully separated from a spouse must obtain consent from his or her spouse (Fam. Code, § 8603). None of these obstacles applies here. Dates of birth found in the record reveal that S.S. and J.S. are more than 10 years older than the children, the children both have indicated consent to the adoption and the S.'s are not separated. Accordingly, no legal impediment to the adoption exists in this case.

We therefore conclude the order terminating parental rights is supported by the record and conditionally reverse that order only to ensure compliance with the notice and inquiry provisions of the ICWA.

DISPOSITION

The order terminating parental rights is conditionally reversed and the matter is remanded to the juvenile court for the limited purpose of permitting DCFS to interview the relevant individuals with respect to the children's possible Native American heritage. If no additional information is obtained, or if no tribe asserts jurisdiction as to the children after DCFS gives notices that includes any additional information it might obtain, the juvenile court shall reinstate the order terminating parental rights.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.